



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

AUG 18 2006

Kevin E. Anderson, Esq.
Parry, Anderson & Gardiner
60 East South Temple
Salt Lake City, Utah 84111

RE: MUR 5598
Utah Republican Party –
Federal Account and
Mike McCauley, in his
official capacity as treasurer

Dear Mr. Anderson:

The Federal Election Commission ("the Commission") previously notified your clients, the Utah Republican Party - Federal Account ("the Committee") and Mike McCauley, in his official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients.

Upon further review of the allegations contained in the complaint, and information supplied by your clients, the Commission, on July 27, 2006, found that there is reason to believe the Committee and Mike McCauley, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(a)(2)(A), 434(b), and 441d. The Factual and Legal Analysis, which formed a basis for the Commission's findings, is attached for your information.

Your clients may submit any factual or legal materials that they believe are relevant to the Commission's consideration of this matter. Statements should be submitted under oath. All responses to the enclosed Subpoena to Produce Documents and Order to Answer Questions must be submitted to the General Counsel's Office within 30 days of your receipt of this letter. Any additional materials or statements you wish to submit should accompany the response to the Subpoena and Order. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

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If your clients are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondents.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that your clients wish the matter to be made public.

If you have any questions, please contact Thomas J. Andersen, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Michael E. Toner
Chairman

Enclosure

Factual and Legal Analysis

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not have been paid at all. Thus, it is unclear whether the URP in fact paid for all of the brochures at issue. Moreover, it is not clear that the degree of volunteer involvement in the distribution of the brochures was sufficient to qualify the brochures as "volunteer materials." If the brochures did not qualify as "volunteer materials," then coordination of them between the URP and the Swallow campaign could have resulted in excessive contributions from the URP to John Swallow and the Swallow Committee.

Based on the facts presented in the complaint, the response, as well as other available information, there is reason to believe that the Utah Republican Party (Federal Account) and Mike McCauley, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(a)(2)(A) by making excessive contributions to John Swallow and the Swallow Committee, 434(b) by failing to report all of its contributions or coordinated party expenditures, and possibly a debt owed to Arena, in connection with the brochures, and 441d by failing to include the appropriate disclaimer on the brochures.

II. FACTUAL & LEGAL ANALYSIS

A. The "Volunteer Materials" Exemption

The purpose of the volunteer materials exemption is "to encourage volunteers to work for and with local and State political party organizations." H.R. Rep. No. 422, 96th Cong., 1st Sess. 9 (1979), *reprinted in* FEC *Legislative History of Federal Election Campaign Act Amendments of 1979* at 193 (GPO 1983). Thus, for the exemption to apply, the materials must be "distributed by volunteers and not by commercial or for-profit organizations." 11 C.F.R. §§ 100.87(d), 100.147(d).

1 Because volunteer materials are exempted from the definitions of both "contribution" and
2 "expenditure" (*see* 2 U.S.C. §§ 431(8)(B)(ix) and (9)(B)(viii)), there is no limit on the amount a
3 State party can spend on communications that qualify for the exemption, and there is no limit on
4 the degree to which such communications can be coordinated with the beneficiary candidate's
5 committee.

6 While the Commission's regulations describe numerous factors that must be met for a
7 communication to qualify for the exemption (*see* 11 C.F.R. §§ 100.87, 100.147), only two are
8 principally relevant to this matter. First, the materials must be paid for by the State or local party
9 committee's Federal funds, and specifically may not be purchased by a national party committee.
10 Second, the materials must be distributed by volunteers and not by commercial or for-profit
11 operations.

12 **1. Who Paid for the Brochures?**

13 The complaint alleges that in addition to the URP, the NRCC was involved heavily in the
14 brochures. Controversy over the brochures apparently first surfaced in an article published in
15 *The Salt Lake Tribune* on October 24, 2004,¹ which reported: "[URP Chairman Joseph A.]
16 Cannon says the state office had acted as a 'conduit' for brochures produced for the NRCC by
17 Arena Communications' Peter Valcarce. Arena workers would drop off boxes of mailings at the
18 party headquarters. Republican volunteers would stamp them. And Arena would take the
19 mailings to the post office for franking under the party's permit." *See* Rebecca Walsh, *National*,

¹ The mailings were controversial in part because some of them harshly criticized Matheson for co-sponsoring legislation that had been supported by two Republican members of Utah's Congressional delegation: Sen. Orrin Hatch and Cong. Chris Cannon.

1 *state levels of GOP blame the other for attack ads*, The Salt Lake Tribune, Oct. 24, 2004.

2 (Compl. Ex. 3.)

3 Another article reported that “[URP Executive Director Spencer] Jenkins said the NRCC
4 and the Utah Republican Party have worked jointly on 14 separate mailers that have gone out
5 either supporting Swallow, criticizing Matheson or both.” Bob Bernick, Jr., *GOP rips Matheson*
6 *for aiding a GOP bill*, Deseret Morning News, Oct. 26, 2004. (Compl. Ex. 1 at 2.) The NRCC,
7 however, denied any involvement. The NRCC’s spokesman, Bo Harmon, was quoted as saying:
8 “That was a Utah Republican Party piece. They researched it and printed it. We had nothing to
9 do with it.” *Id.*

10 In response to the complaint, the URP and Cannon appear to assert that while the press
11 accounts accurately characterized Cannon’s initial statement to the press, Cannon’s statement
12 was inaccurate. Cannon, in an affidavit submitted with the response, stated: “After reviewing
13 the details of the subject materials and mailings prepared and mailed in connection therewith, . . .
14 I have determined that my spontaneous statements, made without the benefit of investigation or
15 review of the applicable facts, were not correct in some particulars.” (Joseph A. Cannon Aff. ¶
16 7.) Further, the URP and Cannon now contend that the URP “paid entirely for the design,
17 printing, and postage for the . . . Mailings, using federal dollars raised by the URP.” (URP and
18 Cannon Resp. at 2.)

19 In support of their assertion that the URP paid for the brochures with Federal funds, the
20 URP and Cannon submitted 14 invoices from Arena; three checks payable to Arena that are
21 written on the URP’s “Federal Campaign Account;” and supposedly corresponding URP bank

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1 records. (URP and Cannon Resp. Ex's. A - C.) However, there is a discrepancy. The 14 Arena
2 invoices total \$257,922.48, whereas the URP's three checks total \$236,396.49 – a difference of
3 \$21,525.99. The missing amount, \$21,525.99, happens to be the precise amount of six of the 14
4 separate invoices from Arena to the URP and thus appears to represent the cost of one particular
5 mailer, but we do not know which one. The bank records do not show any additional payment in
6 the amount of \$21,525.99. Further, not only have the URP and Cannon not supplemented their
7 response with any other cancelled checks in the amount of \$21,525.99, the URP's 2004 FEC
8 disclosure reports show only \$236,396.49 in disbursements to Arena, the same amount of the
9 three checks submitted by the URP and Cannon. See URP's 2004 12-Day Pre-Election and 30-
10 Day Post-Election Reports. Finally, the URP did not report any payments, or debts owed, to
11 Arena in its 2005 FEC disclosure reports. Thus, the available information does not support the
12 URP and Cannon's claim that the URP paid for all 14 brochures.

13 In light of the fact that we do not know who paid for one of the brochures, we reviewed
14 the NRCC's 2004 FEC disclosure reports to see if the NRCC made any payments to Arena.
15 Although the NRCC made several disbursements to Arena during 2004 in connection with
16 congressional races across the country, the NRCC did not report any payments to Arena in
17 connection with John Swallow's race against Congressman Matheson. In addition, in an article
18 published in the *Deseret Morning News*, Arena's owner, Peter Valcarce, stated: "none of my
19 NRCC work is being done in Utah." Bob Bernick, Jr., *GOP breaks campaign laws, Utah Demos*
20 *say*, *Deseret Morning News*, Oct. 27, 2004. (Compl. Ex. 2 at 2.)

1 We also considered whether the NRCC made any transfers to the URP during 2004.
2 According to its FEC disclosure reports, the NRCC transferred \$177,500 to the URP during
3 2004. Two of the transfers, \$50,000 on September 16, 2004 and \$27,500 on October 21, 2004,
4 were made during the time period in which Arena prepared the brochures.

5 In light of these circumstances, we analyzed the URP's FEC disclosure reports to
6 determine whether the URP had sufficient funds to pay Arena for the mailings without using the
7 \$77,500 the NRCC transferred to the URP in September and October of 2004. During the pre-
8 election reporting period (October 1 – 13, 2004), the URP had \$264,511.14 in beginning cash on
9 hand plus receipts (excluding the NRCC's \$50,000 transfer on September 16, 2004) and made
10 one payment to Arena in the amount of \$54,058.87. During the post-election reporting period
11 (October 14 – November 22, 2004), the URP had \$262,514.97 in beginning cash on hand plus
12 receipts (excluding the NRCC's \$27,500 transfer on October 21, 2004) and made payments to
13 Arena totaling \$182,337.62. Thus, it appears that the URP had sufficient Federal funds to pay all
14 of Arena's invoices without using the funds transferred by the NRCC.² For at least 13 of the 14
15 brochures, then, it does not appear that the brochures were "purchased by" the NRCC.

16 However, it remains entirely unclear who paid for the particular brochure apparently
17 represented by the \$21,525.99 difference between what Arena billed the URP and what the URP
18 paid Arena, or even if anyone paid for that brochure. If the URP did not pay for the brochure, the
19 brochure did not qualify for the volunteer materials exception. At any rate, the state of the record

² We also looked at the URP's non-federal account. Although the URP reported one disbursement to Arena from that account on October 7, 2004, in the amount of \$3,857.50, the disbursement was reported as made in connection with a mailing on behalf of a state candidate. See URP's 2004 Detailed Expenditures Report filed with the Utah State Elections Office, found at <https://ucrs.state.us/ucrsppc/public.html>.

1 at the moment appears to be that \$21,525.99 was billed by Arena, never paid by the URP, and
2 never reported as outstanding debt by the URP. A political committee's debts must be reported
3 as outstanding until paid. 2 U.S.C. § 434(b)(8). Consequently, there is reason to believe that the
4 Utah Republican Party (Federal Account) and Mike McCauley, in his official capacity as
5 treasurer, violated 2 U.S.C. § 434(b) by failing to report the debt.

6 **2. Distribution by Volunteers**

7 In previous Enforcement matters the Commission has applied the "no direct mail" and
8 "volunteer distribution" requirements of its regulation by determining that mailings that were
9 sorted for bulk mail treatment and physically delivered to a post office by volunteers qualified for
10 the exemption even if they were printed and folded by a commercial vendor, while materials that
11 were "sent directly from the production house" to the post office or "sent back to the vendor for
12 mailing" did not. See MUR 4471 (Montana State Democratic Central Committee) (qualified for
13 the exemption), MUR 3218 (Blackwell for Congress) (qualified for the exemption), MUR 2377
14 (Republican Party of Texas) (qualified for the exemption), MUR 3248 (New York Democratic
15 Party) (qualified for the exemption), MUR 4538 (Alabama Republican Party) (qualified for the
16 exemption), MUR 2994 (Wyoming State Democratic Central Committee) (did not qualify for the
17 exemption), MUR 2559 (Oregon Republican Party) (did not qualify for the exemption). The
18 Commission has, at the reason to believe phase, initiated investigations where it could not be
19 determined based on the information then available whether materials qualified for the
20 exemption or not. See MUR 4754 (Republican Campaign Committee of New Mexico)
21 (respondent merely submitted copies of volunteer sign-in sheets to support its claim that

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1 volunteers stamped, bundled, and delivered the mailers to the post office); *see also* MUR 4851
2 (Michigan Republican State Committee) (respondent did not provide any evidence of volunteer
3 involvement).³

4 In this instant matter, there are questions that bear investigating as to whether those
5 brochures that were mailed were physically delivered to the post office by volunteers. The URP
6 and Cannon claim that volunteers processed, sorted and hand-stamped the mail pieces and
7 physically delivered them to the post office for mailing. (URP and Cannon Resp. at 2.) Indeed,
8 Cannon has submitted an affidavit to that effect, and the response includes photographs of
9 volunteers hand-stamping the brochures. (URP and Cannon Resp. Ex. D.) However, there are
10 two reasons to question the response's representations. First, Cannon originally told the press
11 that after the volunteers stamped the fliers, Arena took them to the post office. Second, Arena's
12 invoices to the URP include charges for "mail handling" and "postage." If Arena had nothing to
13 do with the actual physical delivery of the brochures to the post office, it is unclear why it would
14 have charged the URP for either "mail handling" or "postage." Cannon claims in his affidavit
15 that his original statement to the press was incorrect, but nothing in the response addresses the
16 charges on Arena's invoices. If those brochures that were mailed were physically delivered to
17 the post office by Arena, they would constitute "direct mail" and would not be eligible for the
18 volunteer materials exemption.

19

³ The investigations in those two matters indicated that the mailers qualified for the exemption, and the Commission ultimately took no further action.

1 **3. Conclusion**

2 In summary, there are questions that bear investigating as to whether any of the brochures
3 that were mailed qualify for the volunteer materials exemption, and the URP further appears not
4 to have continuously reported a debt of more than \$21,000 for one of the fourteen brochures. If
5 investigation of the debt reporting issue revealed that someone else paid for one of the brochures,
6 that brochure would not qualify for the volunteer materials exemption.

7 **B. Excessive Contributions Through Coordination**

8 Under the Federal Election Campaign Act of 1971, as amended ("the Act"), the URP was
9 permitted to contribute \$5,000 directly to John Swallow and the Swallow Committee and to
10 make coordinated party expenditures totaling \$37,310 on behalf of John Swallow. *See* 2 U.S.C.
11 §§ 441a(a)(2)(A), 441a(d). According to the URP's FEC disclosure reports, the URP contributed
12 \$1,000 directly to the Swallow Committee and made \$22,798 in coordinated party expenditures
13 on behalf of John Swallow in 2004. Thus, if the brochures do not qualify for the exemption and
14 were coordinated with the Swallow Committee, the additional coordinated expenditures,
15 \$236,396.49, would have exceeded the remaining limits available to the URP of \$4,000 in
16 contributions and \$14,512 in coordinated expenditures.

17 A state party's public communication is coordinated with a candidate, a candidate's
18 authorized committee, or their agents if it meets a three prong test: (1) payment by a political

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1 party or its agent; (2) satisfaction of one of the content standards set forth at 11 C.F.R.
2 § 109.37(a)(2); and (3) satisfaction of one of the conduct standards set forth in 11 C.F.R.
3 § 109.21(d). *See* 11 C.F.R. § 109.37(a).⁴

4 In this matter, the first prong of the coordinated communication test is satisfied because
5 the URP paid for at least 13 of the brochures at issue. The second prong of this test, the content
6 standard, is also satisfied because each of the brochures attached to the complaint is a "public
7 communication" under 11 C.F.R. § 100.26⁵ and meets the content criteria set forth in 11 C.F.R.
8 § 109.37(a)(2)(iii)(A)-(C). First, both brochures refer to a clearly identified candidate for Federal
9 office (Matheson). (Compl. Ex's. 5, 6.) Second, the brochures were publicly distributed or
10 otherwise disseminated 120 days or fewer before the November 2, 2004 general election.
11 (Compl. at 1; Ex's. 1-4.) Third, the brochures were directed to voters in Utah's 2nd
12 Congressional District, the jurisdiction in which Matheson and Swallow were candidates.
13 (Compl. at 1; Ex's. 1-3.)

⁴ Both the "content prong" and the "conduct prong" of 11 C.F.R. § 109.37 actually incorporate by reference certain provisions of the similar 11 C.F.R. § 109.21, relating to coordinated communications made by spenders other than party committees. Recently, in response to the decision in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005), the Commission approved revisions to 11 C.F.R. § 109.21. The *Shays* litigation did not directly involve 11 C.F.R. § 109.37, and the revisions recently approved by the Commission to 11 C.F.R. § 109.21 were not retroactive. Thus, we apply here the law as it existed at the time of the activity in question. Moreover, on the facts of this case the new rules would not appear to change the result or the analysis even if they were applied retroactively.

⁵ "Public communication" means a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising. 11 C.F.R. § 100.26.

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1 The conduct standard may be satisfied by affirmative acts that fall into six general
2 categories, among them, the use of a common vendor.⁶ See 11 C.F.R. § 109.21(d)(4). To qualify
3 as a "common vendor," a commercial vendor must satisfy three conditions. First, the person
4 paying for the communication must have employed or contracted with a commercial vendor to
5 create, produce, or distribute the communication.⁷ 11 C.F.R. § 109.21(d)(4)(i). This condition is
6 satisfied because the URP contracted with Arena to produce the brochures at issue and Arena,
7 according to its website, "produces award winning Campaign Advocacy Mail, Campaign
8 Brochures, Newspaper Advertising, and Billboard and Logo Design." See Arena's website,
9 <http://www.winningmail.com/main.html>.

10 Second, Arena must have provided any of certain enumerated services to John Swallow
11 during the current election cycle. 11 C.F.R. § 109.21(d)(4)(ii). Those enumerated services
12 include "producing a public communication." See 11 C.F.R. § 109.21(d)(4)(ii)(F). As noted, the
13 term "public communication" includes a mass mailing, which is a mailing of more than 500
14 pieces of mail matter of an identical or substantially similar nature within a 30-day period.
15 See 11 C.F.R. §§ 100.26, 100.27.

⁶ The other conduct standards are: request or suggestion; material involvement; substantial discussion; former employee or independent contractor; and dissemination, distribution, or republication of campaign material. 11 C.F.R. § 109.21(d)(1)-(3), (5)-(6). The Explanation and Justification makes clear that the common vendor category does not presume coordination from the mere presence of a common vendor. See 68 Fed. Reg. 436 (Jan. 3, 2003).

⁷ The term "commercial vendor" means "any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those kind of services." 11 C.F.R. § 116.1(c).

1 The Swallow Committee's FEC disclosure reports show that it made disbursements,
2 totaling \$150,563.26, to Arena during the period of January 5, 2004 through October 26, 2004.
3 Arena's services included campaign brochures and campaign printing. In June 2004 alone,
4 Arena produced four brochures for the Swallow Committee at a cost of \$46,293.83. That same
5 month, the Swallow Committee purchased postage from the U.S. Postmaster in the amount of
6 \$1,184. Assuming that the Swallow Committee had the same bulk mail rate (\$0.12 per piece of
7 mail) as the URP, the amount of postage purchased (\$1,184) would equate to approximately
8 9,866 ($1,184 \div 0.12$) pieces mailed. Thus, because Arena provided one of the enumerated
9 services (producing a public communication) to the Swallow Committee, the second element of
10 11 C.F.R. § 109.21(d)(4) is satisfied.

11 Finally, Arena must have used or conveyed to the URP: (1) information about John
12 Swallow's campaign plans, projects, activities, or needs, which was material to the creation,
13 production, or distribution of the communication or (2) information used previously by Arena in
14 providing services to John Swallow or the Swallow Committee, which was material to the
15 creation, production, or distribution of the communication. See 11 C.F.R. § 109.21(d)(4)(iii).

16 While the URP and Cannon claim that the mailings were not coordinated with the
17 Swallow Committee, we do not know whether Arena used information, or conveyed information
18 to the URP, regarding the Swallow Committee's plans, projects, activities, or needs that was
19 material to the creation, production, or distribution of the mailings. Nor do we know whether
20 information used previously by Arena in providing services to the Swallow Committee was so
21 used or conveyed. However, because the first two elements of the common vendor test are met,

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1 there is reason to investigate whether the use or exchange of information, as described in
2 11 C.F.R. § 109.21(d)(4)(iii), occurred in this matter.

3 Thus, if the URP's \$236,396.49 in expenditures for the brochures did not qualify for the
4 volunteer materials exemption, and the mailings were coordinated with the Swallow Committee,
5 the URP would have exceeded its combined contribution and coordinated party expenditure
6 limits by \$217,884.49, resulting in excessive contributions of that amount. Accordingly, there is
7 reason to believe that the Utah Republican Party (Federal Account) and Mike McCauley, in his
8 official capacity as treasurer, violated 2 U.S.C. § 441a(a)(2)(A) by making excessive
9 contributions to John Swallow and the Swallow Committee.

10 The URP was required to report all of its contributions. *See* 2 U.S.C. § 434(b)(4). The
11 URP, however, reported only \$1,000 in contributions to the Swallow Committee during 2004.
12 Thus, because the URP disclosed \$236,396.49 as disbursements for the brochures instead of as
13 contributions to the Swallow Committee, there is reason to believe that the Utah Republican
14 Party (Federal Account) and Mike McCauley, in his official capacity as treasurer, violated
15 2 U.S.C. § 434(b) by failing to report all of its contributions to the Swallow Committee.

16 **C. Appropriate Disclaimer**

17 Under the Act, any public communication made by a political committee must display a
18 disclaimer. *See* 2 U.S.C. § 441d; 11 C.F.R. § 110.11. Complainant alleges that the brochures at
19 issue did not contain the appropriate disclaimer. If the brochures qualify for the volunteer
20 materials exemption, the URP was required to include in the disclaimer that it paid for the
21 communication, but was not required to state whether the communication was authorized by

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1 John Swallow, the Swallow Committee, or any agent of John Swallow. *See* 11 C.F.R.

2 § 110.11(e). Both brochures attached to the complaint include disclaimers that state, "Paid for by
3 the Utah Republican Party" and include the URP's address. Thus, if the brochures at issue
4 qualify as volunteer materials, the URP used the appropriate disclaimer for these brochures.

5 If the brochures do not qualify as volunteer materials, the URP was required to state in
6 the disclaimer whether the communication was authorized by John Swallow, the Swallow
7 Committee, or any agent of John Swallow. *See* 11 C.F.R. §§ 110.11(b) and (d). The disclaimer
8 on the URP's brochures does not include that information. Thus, there is reason to believe that
9 the Utah Republican Party (Federal Account) and Mike McCauley, in his official capacity as
10 treasurer, violated 2 U.S.C. § 441d by failing to include the appropriate disclaimer on the
11 brochures.

12 **III. CONCLUSION**

13 Therefore, there is reason to believe that the Utah Republican Party (Federal Account)
14 and Mike McCauley, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(a)(2)(A),
15 434(b), and 441d.

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